No. 84-277

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—VS.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

—and—

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARVIN SCHWARTZ
125 Broad Street
New York, New York 10004
(212) 558-4000

Of Counsel:
SARA GOODMAN

Attorneys for Respondents
The Scarsdale Creche Committee, et al.

September 13, 1984

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The United States Court of Appeals for the Second Circuit held in this case that the Establishment Clause neither required nor justified the Village of Scarsdale's content-based refusals to permit a private group's temporary

display of a creche during the Christmas holiday season in a public park, a "traditional public forum" (App. 24a).*

As Judge Pierce wrote for the unanimous panel below (App. 2a), that holding was based upon the "controlling precedents" of *Lynch* v. *Donnelly*, -- U.S. —, 104 S. Ct. 1355 (1984) and *Widmar* v. *Vincent*, 454 U.S. 263 (1981). In *Lynch*, this Court held last term that the City of Pawtucket, Rhode Island did not violate the Establishment Clause when, in the context of the Christmas holiday season, it purchased, maintained and displayed a life-size nativity scene—"notwithstanding the religious significance of the creche." 104 S. Ct. at 1366. In *Widmar*, this Court held that the Establishment Clause neither required nor justified the University of Missouri's discriminatory content-based exclusion of one student group's religious speech from a public forum made available to all other student groups. 454 U.S. at 276-77.

Applying those two recent precedents, and observing that unlike *Lynch*, this case involves "merely accommodat-[ing] a privately-owned creche in a public park that is a traditional public forum" (App. 23a), with "no . . . active involvement, sponsorship or financial support by the Village" (*id.*), the Court of Appeals found *"a fortiori*, the Village's neutral accommodation herein to permit the display of a creche in a traditonal public forum . . . cannot be . . . violative of the establishment clause" (App. 19a).

The Village seeks certiorari on the theory that the Second Circuit's decision reflects "marked extensions" of *Lynch*

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* Citations in the form "App. ——" refer to the designated page in the Appendix to the Village's Petition; "Vill. Pet. ——" to the Village's Petition; "J.A. ——" to the Stipulation of Facts contained in the Joint Appendix in the Court of Appeals; and "J. Ex. ——" to the Exhibit Volume thereto.

and *Widmar* (Vill. Pet. 14) and "represents a profoundly dubious ordering of the First Amendment values pressed on both sides of the case" (*id.* at 20).

That argument is without merit. The decision of the Court of Appeals was compelled by *Lynch* and *Widmar* and marks no extension of this Court's holdings in those cases.* The Village advances no valid reason why certiorari should be granted.

ARGUMENT

I.

The Decision of the Court of Appeals Was Compelled By This Court's Decisions in *Lynch* v. *Donnelly* and *Widmar* v. *Vincent*.

A. *Lynch* dictates *a fortiori* that the Creche Committee's display of its creche at Christmas does not offend the Establishment Clause.

The Village argues that *Lynch* does not dispose of its Establishment Clause defense, urging that "significant

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* Petitioners advance their own implausible "extension" that if the Village is compelled by the Constitution to permit the temporary display of a creche during Chrismas at the very public park in which the Village celebrates the holiday by prayer and carols around a Village-decorated Christmas tree, then the Village must also permit the erection of a six-foot swastika for a week or so around Hitler's birthday or the display in Orthodox Jewish neighborhoods at Yom Kippur of banners proclaiming "God does not hear the prayers of Jews" (Vill. Pet. 16-17). What the Village seems to forget is that it has *never* prohibited a temporary display or symbol in Scarsdale's public parks: all appplicants for symbolic displays have been accommodated—except for Respondents. The Village likewise seems to forget that it has never adopted an ordinance imposing neutral and reasonable "time, place and manner" restrictions upon the erection of symbolic displays in its park system, *cf. Clark* v. *Community for Creative Non-Violence*, —— U.S. ——, 52 U.S.L.W. 4986, 4989 (June 29, 1984); *Members of the City Council* v. *Taxpayers for Vincent*, —— U.S. ——, 104 S. Ct. 2118, 2130 (1984), and that the only display it has censored is the creche at Christmas time. The Village's parade of horribles has no relevance to the facts of this case.

differences" distinguish this case (Vill. Pet. 20). That argument, asserted by the Village below, was rightly rejected by the Court of Appeals. As a matter of law (and common sense),

> If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori,* the Village's neutral accommodation herein to permit the [private] display of a creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary-effect prong of the *Lemon* test and, therefore, violative of the establishment clause (App. 19a).*

Although the point was obvious, the Court of Appeals nevertheless analyzed the "significant differences" raised by the Village and found each of the Village's contentions without merit:

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* Indeed, long before this Court decided *Widmar* and *Lynch,* the Village itself recognized that its neutral accommodation of the Creche Committee for 24 years could not offend the Establishment Clause. When sued in 1976 on constitutional grounds for permitting the Creche Committee's traditional Christmas display, the Village argued in the Southern District of New York: "[T]he Village of Scarsdale granted permission to the Scarsdale Creche Committee to use Village property in the same manner as permission is customarily granted by the Village to any other local organization" (J. Ex. 98, ¶ 4); "[N]either the intentions nor motives of the Scarsdale Creche Committee . . . may be imputed to . . . the defendant Village" (J. Ex. 98-99, ¶ 5); "The Village has done nothing to the plaintiff here, or anyone else, by way of establishing a religion which must be joined or supported, nor conversely has it prevented anyone from exercising his own religious beliefs or lack of them" (J. Ex. 110); "In simple terms, [the Creche Committee's] creche in Boniface Circle in Scarsdale was a part of a traditional celebration of the Christmas season" (J. Ex. 116). The suit was dismissed on procedural grounds, *Rubin* v. *Village of Scarsdale,* 440 F. Supp. 607 (S.D.N.Y. 1977), but as *Widmar* and *Lynch* confirmed, those original assertions by the Village were and remain entirely correct.

1. The Village's "display" argument (Vill. Pet. 21) is wrong both in fact and in law. As the Court of Appeals observed (and as a matter of stipulated fact),

> the Christmas celebration in the Village is not significantly different than the Christmas celebration described in *Lynch.* In Scarsdale, the Village is decorated with many traditional symbols of Christmas. Moreover, Boniface Circle has been the recent site of the Christmas Carol Sing and the site of numerous Christmas decorations" (App. 22a-23a).*

More importantly, this Court held in *Lynch* that the focus of the Establishment Clause inquiry was directed at the creche "in the context of the Christmas season." 104 S. Ct. at 1362. *See also id.* at 1365 ("To forbid the [*government's*] use of this one passive symbol—the creche *—at the very time people are taking note of the season* with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings") (emphasis added).**

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* Boniface Circle is also the site of Santa Claus' arrival on a Village-owned fire truck and the Scarsdale Chamber of Commerce's season-long broadcast of recorded Christmas music (*see, e.g.,* J.A., 78-79, ¶ 56; J.A. 81, ¶ 60). In addition to being the "recent" site of Scarsdale's Christmas Carol Sing, Boniface Circle was, since at least as early as 1959, the *traditional* site of the Town Club's annual Christmas caroling (*see, e.g.,* J.A. 79-80, ¶ 58). It was the annual gathering of Christmas carolers in this centrally-located park which first inspired the Creche Committee to request permission to temporarily display a creche at Boniface Circle (J. Ex. 254, 267).

** The Village nevertheless suggests that this Court's description of individual components in Pawtucket's Christmas display was not

(footnote continued on following page)

2. There is no substance to the Village's claimed private/public land distinction (Vill. Pet. 21-22). In *Lynch*, the government was *in fact* (rather than, as here, in theory) the "message bearer" since "[t]he Pawtucket creche had been displayed for forty or more years with active involvement by the government, including funding . . . and sponsorship by the city" (App. 23a). Moreover, as the Court of Appeals emphasized in rejecting the Village's "land as the message bearer" theory,

> We believe that a proper disclaimer message—especially when coupled with the presence of the valid secular purpose, the lack of excessive entanglement, the Village's general grants of access to its public properties and the publicity the Village's official views have received in Scarsdale [namely that it does not support or endorse the creche]—will ensure that no reasonable person will draw an inference that the Village supports any church, faith or religion associated with the display of a creche during the Christmas season at Boniface Circle" (App. 22a).

3. Finally, the Village's persistent attempt to distinguish *Lynch* on the ground of "political divisiveness" raises a non-issue. This Court held in *Lynch* that no inquiry into the potential for "political divisiveness" is called for unless direct subsidies to religious institutions are challenged. 104 S. Ct. at 1364-65, *citing Mueller* v. *Allen*, —— U.S.

(footnote continued from preceding page)

"trivial or immaterial" (Vill. Pet. 21 n.7). While Scarsdale's celebration of Christmas is constitutionally indistinguishable from Pawtucket's, it would indeed be "trivial" to hold (as the Village urges) that a *privately-owned* creche may be constitutionally displayed at Christmas only if flanked by the requisite number of reindeer and teddy bears.

——, 103 S. Ct. 3062, 3071 n.11 (1983).* This is not such a case.

Even were such an inquiry into "political divisiveness" relevant here, the Establishment Clause would not license Scarsdale to silence a private group's speech in a traditional public forum on the ground that that group's request to speak is potentially "divisive." As Justice Brennan said in *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978):

> The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association . . . . [The Establishment Clause] may not be used as a sword to justify repression of religion or its adherents from any aspect of public life (concurring opinion) (citations and footnote omitted).

B. *Widmar* dictates that the Village's content-based exclusion of the Creche Committee from a traditional public forum violated Respondents' First Amendment rights to freedom of speech.

The Village asserts that the Court of Appeals' decision distorts *Widmar* and violates "cherished principles of free expression" (Vill. Pet. 17). According to the Village, even if the Establishment Clause does not dictate that it "must" prohibit access to Boniface Circle, it nevertheless "may" exclude the Creche Committee from a traditional public forum. Citing cases which have no relevance here, the Village argues that the public park—the "quintessential" public forum whose special status in First Amendment jurisprudence has been repeatedly confirmed by this Court

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* Justice O'Connor suggested in her concurrence in *Lynch* that the "political divisiveness" test should be abandoned as an independent test of constitutionality. 104 S. Ct. at 1367. *See also* Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205 (1980).

at least since *Hague* v. *C.I.O.*, 307 U.S. 496 (1939)*—is now a "special part of home" where unwanted messages may be censored on a content basis without regard to reasonable time, place and manner regulations (Vill. Pet. 17).**

Those propositions are the direct antithesis to this Court's expositions of the First Amendment. We had thought that the "cherished principles of free expression" which govern here are the most basic and the most familiar and are as controlling in Scarsdale as they are elsewhere:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . . To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control . . . . There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

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* *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, —— U.S. ——, 103 S. Ct. 948, 955 (1983). *See also United States* v. *Grace*, —— U.S. ——, 103 S. Ct. 1702 (1983); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

** The Village does not have a statute, ordinance, rule or regulation which sets forth the standards or guidelines upon which Scarsdale's Board of Trustees bases its decisions to grant or deny applicants permission to use Village parks or other public property (App. 3a-4a; J.A. 70-71, ¶ 44). Rather, the Village's seven trustees determine *ad hoc* who is entitled to use Village property and under what conditions (App. 43a n.8).

> Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972) (citations and footnote omitted).
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> * * *
>
> The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place. *Widmar* v. *Vincent*, 454 U.S. 263, 267-68 (1981).*

Moreover, less than four months ago, this Court stressed that while a neutrally-applied content-free regulation of display signs on public property is constitutionally permissible,

> there are some purported interests—such as a desire to suppress support for a minority party or an unpopular cause or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others.
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* *See also Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975) ("Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law"); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Women Strike for Peace* v. *Morton*, 472 F.2d 1273, 1276 (D.C. Cir. 1972) (federal government may not "pick and choose among citizens wishing to communicate their views" in a public park); *U.S. Southwest Africa/Namibia Trade & Cultural Council* v. *United States*, 708 F.2d 760, 769-70 (D.C. Cir. 1983) (government may not censor "controversial" political displays in such public forums as National and Dulles Airports).

> That general rule has no application to this case. For there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express. The text of the ordinance is neutral . . . concerning any speaker's point of view and the District Court's findings indicate that it has been applied to appellees and others in an even-handed manner. *Members of the City Council* v. *Taxpayers for Vincent*, —— U.S. ——, 104 S. Ct. 2118, 2128-29 (1984) (citations omitted).

The Establishment Clause was not offended in the twenty-four years that the Creche Committee was allowed to temporarily display its creche in order to express "the real significance of Christmas time" (Vill. Pet. 3, *quoting* J. Ex. 1). What *was* offensive to the First Amendment was the Village's discriminatory content-based refusal to permit continued access to a traditional public forum, solely because the Creche Committee sought to express ideas which *some* people in the community "reject[ed,] or oppose[d] or [found] offensive" (Vill. Pet. 17).

CONCLUSION

The Village's Petition should be denied.

Respectfully submitted,

MARVIN SCHWARTZ
125 Broad Street
New York, New York 10004
(212) 558-4000

Of Counsel:
SARA GOODMAN

Attorneys for Respondents
The Scarsdale Creche Committee, Patricia Curran, Cynthia Barsuhn, Grace Fellows, Doris Adler, Mary Tully, Joan Mann and Maria Pedulla

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